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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

Greg M. Oester and Lynda C. Oester, his  
wife,

Plaintiffs,

vs.

Wright Medical Technology, Inc., a  
Delaware corporation,

Defendant.

No. 2:19-cv-04763-PHX-SPL

**PLAINTIFFS' RESPONSE TO  
DEFENDANTS DAUBERT  
MOTION TO PARTIALLY  
EXCLUDE THE EXPERT  
OPINIONS OF ENGINEER MARI  
TRUMAN**

Plaintiffs, Greg M. Oester and Lynda C. Oester, by their undersigned attorney,  
opposes Defendants' Motion to Partially Exclude the Rule 26 Expert Opinions of Mari  
Truman P.E., and state:

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<i>In re Roundup Prod. Liab. Litig.</i> , 390 F. Supp. 3d 1102, 1109 (ND Cal. 2018)	7
<i>Primiano v. Cook</i> , 598 F.3d 558, 595-596 (9th Cir. 2010)	8

**TABLE OF EXHIBITS**

- A. Plaintiff's Rule 26 Expert Witness Disclosures
- B. Mari Truman, P.E. Rule 26 Expert Report dated Mar. 24, 2021 & Curriculum vitae
- C. Deposition of Theodore Firestone, MD taken Jan. 7, 2021
- D. Ex #0017 to Firestone MD Deposition (op report right hip revision sx)

**PLAINTIFFS' RESPONSE SUMMARY**

As stated by the defense, this is a products liability action concerning the failure of Plaintiff's hip implant prosthesis that was manufactured by the Defendant. Plaintiff's engineering expert Mari Truman P.E. Mari Truman is a biomechanical engineer and provided a detailed expert report pursuant to FRCP 26 setting forth her expert opinions as to the failure of the prosthesis, and the mechanics of the failure. (Exhibit 2). Defendant elected not to take her deposition.

It does not appear that Defendant is challenging her general qualifications as an engineer in the field of orthopedic prosthesis but rather is challenging a portion of her opinion on corrosion of the device and general design defect based upon the fact that she did not personally examine a part of the device before rendering her report. The device has four parts; a stem, a neck, a ball, and a cup. The stem, neck, and the cup were not removed from the plaintiff.

Her report explains that part of her opinions regarding corrosion of the device was based upon the revision surgeon's records and deposition testimony. The fact that corrosion of the device was the medically causative factor in the failure of the hip was a medical diagnosis given properly within the purview of the revision surgeon and non-retained medical expert, Theodore Firestone M.D. Engineer Truman is entitled to rely on that medical diagnosis in forming her opinions. Plaintiff's FRCP 26 Disclosure of Dr. Firestone's opinion discloses that he will testify that he found corrosion during the revision surgery. Dr. Firestone confirms that opinion in his deposition (Depo P.133, L. 5-10.)

**LEGAL ARGUMENT**

**Prior Daubert Rulings Involving Engineer Truman Support  
Admission of her Opinions in This Case**

Defendant's challenge to Engineer Truman's opinion go to the weight of her testimony and provide an opportunity for cross-examination at trial but does not implicate a Daubert exclusion of her opinions.

Defendant cites a number of prior Daubert cases involving Mari Truman's opinions on different manufacturers of hip implant prosthesis. In every one of those cases, her general opinion that the devices were defective was found to be reliable and admissible. In *Fitzsimmons* and *Hardison*, cases involving Biomet hips, a portion of her opinion about an issue called "taper mismatch" was excluded. Engineer Truman's opinion in this case does not include opinions about taper mismatch. See, *Fitzsimmons v. Biomet Orthopedics, Inc.* 2020 WL 6784236 (MD Fla. Nov. 18, 2020); *Hardison v Biomet, Inc.*, 2020 WL 4334108 (MD Ga. July 27, 2020); *Bayes v. Biomet, Inc.*, 2020 WL 5594059 (ED Mo. Sept.18, 2020)(excluding a portion of her opinion on medical causation due to taper mismatch.)

The Biomet cases cited by Defendant are individual remand cases that were part of *In re Biomet M2a Magnum Hip Implant Prod. Liab. Litig.*, No. 3:12-MD-2391, 2017 WL 10845178 (N.D. Ind. Dec. 21, 2017). In that MDL, Engineer Truman served as a generic expert for the benefit of hundreds of cases and was subject to Daubert analysis by MDL Judge Miller who had devoted several years of work on the Biomet hip implant MDL. In his Daubert Order Judge Miller stated:

*"Ms. Truman is a biomedical engineer with experience designing and testing medical device implants, including hip implants. I agree with Judge Kinkeade that an engineer with experience with lubrication and device wear issues through device design and testing can opine on those issues "despite the fact that [her] degrees are in the field of mechanical engineering rather than tribology." In re:*

1 DePuy Orthopaedics, Inc., No. 3:11-MD-2244-K, 2016 WL 6271474, at \*10 (N.D.  
 2 Tex. Jan. 5, 2016). To the extent Biomet seeks to exclude Ms. Truman opinion  
 3 that all metal-on-metal devices are defectively designed because she is not  
 4 qualified to offer it, the motion is denied. In re Biomet M2a Magnum Hip Implant  
 5 Prod. Liab. Litig., No. 3:12-MD-2391, 2017 WL 10845178, at \*11 (N.D. Ind. Dec.  
 6 21, 2017). Judge Miller's reference to Judge Kinkeade and the DePuy MDL was  
 7 to an MDL with over 5,000 DePuy hip implant cases in which Mari Truman's  
 8 opinions were found to be reliable and admissible.

9 In the Biomet MDL opinion Judge Miller also stated:  
 10 "Ms. Truman can't testify as an expert on the clinical effects of metal ions, but  
 11 she can permissibly rely on other experts' opinions that metal ions cause clinical  
 12 effects to support her opinion that metal-on-metal devices are unreasonably  
 13 dangerous. See Dura Auto. Sys. of Indiana, Inc. v. CTS Corp., 285 F.3d 609, 614  
 14 (7th Cir. 2002). That's what she did in her report, so her opinion is admissible."  
 15 In re Biomet M2a Magnum Hip Implant Prod. Liab. Litig., No. 3:12-MD-2391,  
 16 2017 WL 10845178, at \*15 (N.D. Ind. Dec. 21, 2017).

17 Likewise, in the instant case, Engineer Truman is relying on Dr.  
 18 Firestone's deposition testimony and his operative report that corrosion of the  
 19 device was one of the causes of injury to the plaintiff. (Truman report at p. 3, 4,  
 20 12, 14-15). Dr. Firestone's operative report stated: "*The patient was indicated for*  
 21 *revision because of elevated cobalt chromium ion levels and evidence of*  
 22 *metallosis on MRI.*" The operative report further stated: "*Deep retractors were*  
 23 *placed and I exposed the joint, significant corrosive type tissue was noted and a*  
 24 *complete debridement was performed.* He also found a "cold weld" between the  
 25 stem and the neck. Dr. Firestone stated in his deposition that: "*Corrosive-type*  
 26 *tissue was noted. That means when I'm—when I see grayish—grayish tissue, I*  
 27 *consider that corrosive-type tissue.*" Firestone depo at page 131, lines 10-13.  
 28

1 Dr. Firestone also testified “Yes. *There’s obviously corrosion, though*  
 2 *because that’s why the grayish tissue comes and the—the—the metal debris is*  
 3 *from the titanium neck. So, you know, it was just not to the point where I felt it*  
 4 *would be unwarranted to continue—to use it.”* Firestone Depo P.133, L. 5-10.

5  
 6 **LEGAL ARGUMENT**  
 7 **Defendants Challenges go to the weight of the evidence**  
 8 **and not to reliability under Daubert**

9 Recently, a District Court judge provided an instructive summary of the  
 10 current law in the Ninth Circuit as follows:

11 *“However, the question at this phase is not whether the plaintiffs’*  
 12 *experts are right. The question is whether they have offered opinions*  
 13 *that would be admissible at a jury trial. And the case law—particularly*  
 14 *Ninth Circuit case law—emphasizes that a trial judge should not*  
 15 *exclude an expert opinion merely because he thinks it’s shaky, or*  
 16 *because he thinks the jury will have cause to question the expert’s*  
 17 *credibility. So long as an opinion is premised on reliable scientific*  
 18 *principles, it should not be excluded by the trial judge; instead the*  
 19 *weaknesses in an unpersuasive expert opinion can be exposed at trial,*  
 20 *through cross-examination or testimony by opposing experts.”* In re:  
 21 Roundup Prod. Liab. Litig., 390 F. Supp. 3d 1102, 1109 (N.D. Cal.  
 22 2018)

23 Further, as stated in *Daubert*, “vigorous cross-examination, presentation of  
 24 contrary evidence, and careful instruction on the burden of proof are the  
 25 traditional and appropriate means of attacking shaky but admissible evidence.”  
 26 *Daubert v. Merrell Dow Pharms., Inc.* 509 U.S. 579 at 597 (1993), citing *Rock v.*  
 27 *Arkansas*, 484 U.S. 44, 61 (1987).  
 28

1 Here, Dr. Firestone provides the medical causation and Engineer Truman  
2 is properly relying on that opinion for medical causation. Three of the four parts of  
3 the device were not available for inspection because they could not be removed  
4 but Dr. Firestone reported his intraoperative observations which were a proper  
5 foundation for Engineer Truman's opinions. Part of his intraoperative observations  
6 were that the stem and the neck could not be removed because they were cold  
7 welded together with corrosion, that corrosion in the tissues of the Plaintiff which  
8 he had to remove, and that the Plaintiff had high metal ions in his blood, Plaintiff's  
9 was metallosis.

10 Therefore, engineer Truman did not give opinions outside the area of her  
11 expertise and her opinion that the device was defective and unreasonably  
12 dangerous are reliable, fit the case and should be admissible.  
13

14 The Ninth Circuit has also made it clear that an expert on product defect is  
15 not required to prove every element of the case independently. *Primiano v. Cook*,  
16 598 F.3d 558, 595-596 (9th Cir. 2010) ("Expert opinion testimony is reliable if the  
17 knowledge underlying it has a reliable basis in the knowledge and experience of  
18 the relevant discipline. Reliable expert testimony need only be relevant, and need  
19 not establish every element that the plaintiff must prove in order to be  
20 admissible.")

## 21 **CONCLUSION**

22  
23 Mari Truman, P.E. is qualified to give the opinions set forth in her report.  
24 Her opinion on general product defect and corrosion properly rely on Dr.  
25 Firestone's observations of all four parts of the implant during surgery and his  
26 opinions on medical causation. Thus, her opinions are reliable, fit the facts of this  
27 case, and will assist the jury in determining whether Defendant's product is  
28 defective.



**CERTIFICATE OF SERVICE**

I CERTIFY that, on July 20, 2021, Plaintiffs' Response in Opposition to Defendant's Motion to Partially Exclude the Expert Opinions of Mari Truman, with exhibits, were served via Share File to:

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